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No. 83-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT E. LEE,

Petitioner,

v.

NATIONAL CAN CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a racially motivated refusal to interview a black job applicant while white applicants *are* being interviewed and hired constitutes a refusal or failure to hire in violation of Title VII?
2. Where an employer engages in racial discrimination in refusing to interview a job applicant, may the employer justify said refusal to hire by information subsequently received?
3. After a trial on the merits, where it is shown an employer has engaged in racial discrimination, is it an abuse of discretion for a Court of Appeals to reverse a trial Court because one element of a *prima facie* case was purportedly not established?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF CASE	3
REASONS FOR GRANTING WRIT:	
I.	
The Decision Below Conflicts With EEOC Regulations By Exempting Employment Interviews From The Scope Of Title VII Of The Civil Rights Act Of 1964	7
II.	
The Decision Below Raises An Important Question Of First Impression Concerning What Constitutes A Proper Nondiscriminatory Reason For An Employer's Refusal Or Failure To Hire A Job Applicant	11
III.	
After A Trial On The Merits, Where It Is Shown An Employer Has Engaged In Racial Discrimination, It Is An Abuse Of Discretion For A Court Of Appeals To Reverse A Trial Court Because One Element Of A *Prima Facie* Case Was Purportedly Not Established	14
CONCLUSION	20

APPENDIX

A—Opinion and Judgment of the United States Court of Appeals of the Seventh Circuit of February 8, 1983 ..... 1a

B—Opinion of the United States District Court, Northern District of Illinois, Eastern Division 12a

C—Order of the Supreme Court of the United States Extending Time to File Petition for Writ of Certiorari 29a

TABLE OF AUTHORITIES

Cases Page

Albemarle Paper Co. v. Moody, 401 U.S. 424 (1971) 7, 8

Blake v. Los Angeles, 595 F.2d 1367 (9th Cir., 1979) 8

Franks v. Bowman Transportation Co., 424 U.S. 744 (1976) 8

Gregory v. Litton Systems, Inc., ... F.2d 631 (9th Cir., 1972) 8

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 7, 8

McDonnéll Douglas Corp. v. Green, 411 U.S. 792 (1973) 15

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 11

United States Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478 (1973) 14, 16

Statutes

29 C.F.R. §1607.2B (1981) 7

29 C.F.R. §1607.3A (1981) 7

42 U.S.C. §2000e-2(a) 2, 3, 7

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert E. Lee, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on February 8, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported and is printed in Appendix A hereto, *infra*, pages 1a-10a.

The opinion of the United States District Court, Northern District of Illinois, Eastern Division is unreported and is printed in Appendix B hereto, *infra*, pages 12a-28a.

JURISDICTION

The judgment of United States Court of Appeals of the Seventh Circuit (Appendix A, *infra*, page 11a) was entered on February 8, 1983. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(a).

On May 9, 1983, Justice Stevens entered an Order extending the time for docketing this appeal to and including July 8, 1983, and is printed in Appendix C hereto, *infra*, page 29a.

STATUTE INVOLVED

United States Code, Title 42

§2000e-2(a) Discrimination because of race, color, religion, sex, or national origin.

EMPLOYERS: It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Robert E. Lee, a black machinist, brought suit against National Can Corporation for discrimination in employment because of his race.

The District Court of the Northern District of Illinois after a full trial on the merits, found that National Can Corporation had discriminated against Lee in refusing to hire him because of his race, black. The District Court awarded Lee $55,306.94 in back pay plus attorney's fees and cost. The Circuit Court of Appeals for the Seventh Circuit reversed the District Court on the basis of Lee having failed to prove he was qualified for the position sought, and therefore, that he had not proved a *prima facie* case of racial discrimination; and, further found that if Lee had proven his qualifications, National Can had articulated a nonpretextual, legitimate reason for its refusal to hire.

National Can Corporation opened a new facility in Elk Grove Village, Illinois prior to May, 1977. (R. 4).

The Corporation placed an advertisement in the job mart section of the Sun-Times newspaper in Chicago, Illinois. (R. 164). Stating that positions were available for journeyman machinists with 5 years experience and precision carbide grinders with 2 years experience. The ad listed the name of the corporation and a telephone number for applicants to call. (R. 76). Lee read National Can's advertisement, telephoned and was given the date of May 10, 1977, for an appointment for an interview. (R. 52). Lee had worked as a machinist for many years and on two occasions was employed by the federal government. He had recently lost several jobs, however. Upon arrival, the receptionist handed Lee an application form and lead him to an adjacent room to complete said form. (R. 53). While completing the form, Lee observed two or three caucasian applicants arrive. (R. 54). All three men received application forms from the receptionist and were led into the same room as Lee to complete the forms. (R. 54). Lee was the only black applicant that day. (R. 128).

Shortly after completing the application form, Lee was called into the personnel manager's office where he was given a preliminary screening interview. (R. 55). The screening interview with the personnel manager, Michael Glynn, lasted about 10 minutes. (R. 56). Lee was asked a few questions concerning his work experience and history. (R. 56). There was nothing in the application form to disqualify Lee as a machinist for National Can Corporation.

At the conclusion of the screening interview, Glynn informed Lee that the primary technical interview would be conducted by the machine shop foreman, Joseph Turczak. (R. 56). Lee was told to wait in the reception

area, where he waited from 10:30 a.m. until 3:45 p.m. (R. 59). He left without being interviewed. (R. 62).

During that time, Lee spoke to the receptionist on at least three occasions concerning the delay of his interview with Turczak. (R. 62). Two white applicants, Larry Wickstrom and James O'Connor, applied for the same position on May 10, 1977. Both were given the primary technical interview with Turczak that day. Both were hired. (R. 172).

Lee telephoned the following day and when he was unable to reach the personnel manager, he filed a complaint with E.E.O.C. (R. 68). Lee telephoned National Can the second day after submitting his application, specifically May 12, 1977, and was again told that the personnel manager was in a meeting. (R. 64). One or two days later, Lee telephoned National Can again and without identifying himself asked if there was a job opening for a machinist. (R. 63). He was immediately put through to Glynn. (R. 64). Lee then identified himself and asked about the disposition of his application. Glynn stated that they were "very busy with meetings". (R. 64). He did not answer Lee's question concerning his job application and did not give Lee an appointment for an interview with the shop foreman. (R. 64). National Can did not allow Lee to continue in the interviewing process. At trial no fact was presented by National Can regarding Lee's qualifications as a machinist because they did not bother to examine his qualifications. A reference check was not made until after litigation commenced.

During late May, 1977, National Can changed their advertisement in the Sun-Times to a blind ad which provided a coupon to be completed with name, address,

telephone number, etc., of applicant and designated a box number at the Sun-Times as the return address. (R. 77). Lee made a second application to National Can in an attempt to find out why he received the treatment he did during his first visit. (R. 160).

Lee filled out the coupon in the blind ad, using his middle and last name only and listing his telephone number and address. He received a telephone call from Glynn and given an appointment for June 7, 1977. (R. 65). Upon arrival, Lee filled out and signed an application form using a different Social Security number, Spouse's name and job history. (R. 66). Lee was escorted into Glynn's office, and Lee ask Glynn why he had not been given an opportunity to interview for the position advertised. Glynn asked Lee to leave the premises. (R. 66-67). National Can continued to advertise for machinists. (R. 78).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH EEOC REGULATIONS BY EXEMPTING EMPLOYMENT INTERVIEWS FROM THE SCOPE OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, makes it an unlawful employment practice for an employer to "fail or refuse to hire . . . any individual . . . because of such individual's race. . . ."

Despite this statutory language, the Seventh Circuit has ruled in this case that the defendant-employer's refusal to interview a black job applicant while white applicants were being interviewed was "not the type of conduct prohibited by Title VII." (See pp. 9-10 of Appendix A hereto.) This ruling conflicts with the regulations of the Equal Employment Opportunity Commission (EEOC), which apply to "tests and other selection procedures which are used as a basis for any employment decision." 29 C.F.R. §1607.2B (1981). The EEOC regulations state that the "use of any selection procedure which has an adverse impact on the hiring . . . or other employment opportunities of members of any race . . . will be considered to be discriminatory and inconsistent with these guidelines." 29 C.F.R. §1607.3A (1981). These regulations, which have been held by this Court to be entitled to great deference, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); were improperly ignored in the decision below.

The Seventh Circuit's interpretation of Title VII in this case also disregards this Court's explicit statement

that Title VII was "intended to prohibit all practices, in whatever form which create inequality in employment opportunity due to discrimination on the basis of race." *Franks v. Bowman Transportation Co.*, 424 U.S. 744, 763 (1976). In fact, this Court has not hesitated to apply Title VII to any racially discriminatory practice or device that acts as a pre-employment barrier. See e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Similarly, the EEOC and the federal courts in other Circuits have applied Title VII to a variety of pre-employment practices, including job recruitment, EEOC Decision No. 77-7 (Feb. 22, 1977), job testing, *Blake v. Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), and the content of job interviews, *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972). Surely it is anomalous to apply Title VII to the discriminatory content of job interviews, but not apply it to a discriminatory denial of an interview altogether.

The Seventh Circuit's interpretation of Title VII seriously undermines its efficacy for prohibiting racial and other forms of unjust discrimination at the hiring stage of employment. Under the approach taken by the Seventh Circuit, an employer who engages in racial discrimination in refusing or failing to interview a qualified individual nevertheless can escape the mandate of Title VII merely by keeping the individual's application "pending". To hold that this subterfuge does not come within the purview of Title VII ignores that a racially motivated refusal or failure to interview a job applicant while other applicants are being readily interviewed (as occurred in this case) is, in effect, a refusal or failure to hire for no other reason than racial animosity.

National Can's contention that the file was "pending" is clearly subterfuge in light of the following testimony at trial by Lee (R. 64):

> Q. And what did he say?
>
> A. I mentioned to him that I had waited earlier in the week and I wanted to know what was the disposition of my job application; could I expect to get the job. And he said, "Well, we have been having meetings, lots of meetings, and we are going to be having a lot more meetings."
>
> And I said, "Will I be able to get the job?"
>
> Q. Were you given an appointment?
>
> THE COURT: Let him finish the answer.
>
> MR. STIMSON: I am sorry, Your Honor.
>
> THE COURT: I want to hear this answer.
>
> BY THE WITNESS: A. And he says, "Well, we got a lot more meetings." He never mentioned anything about whether I could get the job or not. He kept talking about the meetings that they had and that they was going to have and that was the only thing I could get out of him.
>
> BY MR. STIMSON: Q. Did he set up an appointment for you to come out?
>
> A. No.
>
> Q. Did he mention any time when you could come out and be interviewed by the shop foreman?
>
> A. No.

The issue of the interviewing process was carefully considered by the District Court and, observing the demeanor of all parties and witnesses, the District Court found as follows (R. 381-382):

> . . . There was a position open for a machinist. He applied. He was not given the position. Two White persons, Mr. James O'Connor and Mr. Larry Wickstrom, were employed that day.
>
> Now, according to Mr. Glynn, Mr. Wickstrom was interviewed by Mr. Turczak in the morning

before Mr. Turczak went to this meeting. There is a conflict about that and I don't think it is necessary to resolve the conflict as to that point. It is enough to point out that on that date two White persons were given the job of machinists and Mr. Lee, a Negro, was not even interviewed.

But, the case of Mr. O'Connor is of particular interest because, according to Mr. Glynn, the defendant's testimony, Mr. O'Connor wasn't interviewed in the morning; he was interviewed in the afternoon. According to Mr. Glynn, he told Mr. Lee to come back and tried to reach Mr. Turczak later and according to Mr. Glynn, Mr. Lee agreed to do that, but with regard to Mr. O'Connor, Mr. Glynn was careful to arrange to have Mr. Turczak interview him in the afternoon.

Mr. Turczak contradicts Mr. Glynn's testimony that Mr. Glynn gave here under oath. Mr. Glynn said he told Mr. Turczak that Mr. Lee, by name, was waiting to see him in the afternoon. Mr. Turczak said nothing like that occurred. What happened was he was told there were two people waiting to see him and that he was available in the afternoon and he interviewed Mr. O'Connor and hired him.

The Court accepts that version given by Mr. Lee. Why? Because it is reasonable. It is supported by the facts and circumstances. It is corroborated by all the surroundings of the very simple event. It is plausible.

The Court observed Mr. Lee when he testified and the Court found him to be believable, despite all the other things that the defendant has called this Court's attention to, to discredit Mr. Lee as a witness.

Now, this being so, the Court concludes that the defendant, National Can Corporation, on May 10, 1977, engaged in an unlawful employment practice against the plaintiff, Robert E. Lee, because on that

> day, the defendant, Mr. Lee, being qualified for the position of journeyman machinist, did not interview Mr. Lee, interviewed two White persons, employed the White persons and didn't employ Mr. Lee because of his race and color.

The present case presents a striking example of how Title VII can be vitiated by excluding job interviews from its scope. On the very day that plaintiff was told repeatedly that the shop supervisor was unavailable to interview him, two white applicants for the same job were interviewed by that very supervisor and subsequently were hired. To hold, as the Seventh Circuit did here, that such conduct by an employer is not prohibited by Title VII distorts the meaning of that statute beyond recognition.

II.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FIRST IMPRESSION CONCERNING WHAT CONSTITUTES A PROPER NONDISCRIMINATORY REASON FOR AN EMPLOYER'S REFUSAL OR FAILURE TO HIRE A JOB APPLICANT.

It is a well-established rule that an employer can rebut a Title VII charge of discrimination by articulating a legitimate nondiscriminatory reason for refusing or failing to hire a job applicant, but that the articulated reason must be the true cause of the refusal or failure to hire, rather than a mere pretext. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In the present case, however, the Seventh Circuit extended this rule to allow an employer to rebut a charge of racial discrimination by relying upon information of which the employer had no knowledge at the time the discrimination occurred. This extension of the rule enables employers to use after-the-fact excuses as a means

of rationalizing racial and other forms of unjust discrimination.

In the decision below, it was held that the defendant's articulated reason for refusing to hire the plaintiff because he had falsified his second job application constituted a legitimate nondiscriminatory reason. (See pp. 8-9 of Appendix A hereto.) Moreover, it was also held that the evidence introduced by the plaintiff was insufficient to establish that the reason articulated by the defendant was a pretext. (See p. 9 of Appendix A hereto.)

The District Court found racial discrimination to have occurred on May 10, 1977; and made the following finding's regarding the second job application (R. 375-376):

> Now, take the application of June 7, 1977. Mr. Lee has explained and this Court finds it a totally plausible, acceptable explanation. He wanted the job as a machinist and he wanted to find out why they wouldn't talk with him on May 10, 1977, so he changed his name, gave them his other Social Security number which, on the record before me, I can't find he had illegally or improperly because no one has produced any evidence about it. So, he used that Social Security number and he went there to try to find out about a job. I happen to know, and it is a matter of common knowledge, that a person seeking this precious liberty of the right to work that Mr. Justice Douglas spoke of in *Bosky v. Board of Regents*, will do what Mr. Lee did, he will use subterfuge to find out whether or not these people he dealt with on May 10, 1977, were not, in fact, engaged in an unlawful employment practice of race discrimination. He wanted to find out.

The District Court went on to describe the actions of National Can, in light of Lee's testimony, and in support of its conclusion that the reason for not hiring Lee was patently pretextual (R. 376-377):

> Now, the other thing that he is corroborated about, he is corroborated by Mr. Glynn. If Mr. Glynn was testifying truthfully in this Court that he called Mr. Lee and arranged for Mr. Lee to come for an appointment; the first thing that Mr. Glynn would have told Mr. Lee when he saw him, would have been, "Well, my God, man, I have been looking for you. Well, sit down here and take a job as a machinist." He didn't do that. The first thing that Mr. Glynn did was to go compare those two applications and then characterizing one or the other as false. Why? Because Mr. Glynn and Mr. Turczak were engaged in race discriminatory conduct toward Mr. Lee. That is why Mr. Glynn did that.
>
> So, for all of these reasons, I come to the conclusion that Mr. Lee is not a person not to be believed in this case because he is corroborated in an important, small way, and, therefore, the defense which the defendant asserts, will not be accepted by this Court.

Putting aside the fact that the plaintiff falsified his second job application in order to show that on his first application he had been the victim of racial discrimination, there is a serious flaw in the calculus by which the above holdings in the Seventh Circuit were reached. That flaw revolves around the undisputed fact that the defendant refused to interview the plaintiff on May 10, 1977, which is almost a complete month before the plaintiff submitted his second job application on June 7, 1977. Thus, on the date in question, it was absolutely impossible for the defendant to establish a legitimate nondiscriminatory reason for its refusal to interview the plaintiff. Under these circumstances, the defendant's articulated reason for refusing to interview the plaintiff due to statements made on his second job application should be considered, as a matter of law, nothing more

than a shallow pretext to disguise what was in fact racial discrimination.

For the effective enforcement of Title VII, it should be made clear that after-acquired information may not be used by an employer to justify action that was motivated at the time it occurred solely by racial discrimination. Under Title VII, an employer should not be allowed to engage in racial discrimination, and later "purify" it with after-the-fact pronouncements. By failing to recognize that after-the-fact excuses for a refusal to interview are intrinsically pretextual, the Seventh Circuit thwarted the promise of Title VII to prevent racial discrimination in employment practices.

III.

AFTER A TRIAL ON THE MERITS, WHERE IT IS SHOWN AN EMPLOYER HAS ENGAGED IN RACIAL DISCRIMINATION, IT IS AN ABUSE OF DISCRETION FOR A COURT OF APPEALS TO REVERSE A TRIAL COURT BECAUSE ONE ELEMENT OF A *PRIMA FACIE* CASE WAS PURPORTEDLY NOT ESTABLISHED.

In reversing the District Court, the Seventh Circuit ruled that the Plaintiff, Robert E. Lee, was unqualified as a journey machinist, and therefore failed to establish a prima facie case. This ruling runs afoul of this Court's recent decision in *United States Postal Service Board of Governors v. Aikens* (103 S. Ct. 1478 (1983)), which held that consideration of the issue of the existence of a *prima facie case* after a full trial was an evasion of the ultimate question of discrimination *vel non*. A similar evasion of the "ultimate question of discrimination" has been permitted by the Seventh Circuit in the case instanter, in which Lee more than satisfied the threshold requirement of qualification for the position sought

as required by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Robert Lee responded to Defendant's advertisement for journeyman machinists with five years experience. Evidence at trial showed that Lee studied Machine Shop for 4 years in high school and participated in a 6 month Shop Practice course at Whitney Aircraft Training School, Kansas City, Missouri. (R. 49). After graduation, Lee was employed by Pratt Whitney Aircraft Corporation as a machinist for two years. (R. 50). Following military service, Lee was employed as a machinist at Pearl Harbor Navy Yard for two years. (R. 53). Lee worked for Rockwell International for 10 years and was considered a qualified machinist by his supervisor. (R. 18). Professor Serape Kalpakjian, Professor of Mechanical Engineering at Illinois Institute of Technology examined Lee concerning Lee's knowledge of machine tools. (R. 195). In Professor Kalpakjian's opinion, Lee is qualified to use milling and jig-boring machines plus qualified in related aspects such as reading blue prints. (R. 205).

The Seventh Circuit found that the Defendant was seeking employees whose skills exceeded Lee's expertise and that Lee's job history precluded a correct finding by the District Court that Lee was qualified. These conclusions by the Seventh Circuit on the issue of qualification of a job applicant are incorrect as a matter of law and seriously undercut the purpose of the Title VII mandate against discrimination in the job marketplace for two reasons.

The first reason for this is that *McDonnell v. Green* set forth the requirement of a Plaintiff's qualifications for an available job as a threshold test. That test has been adequately met here and the question of whether a

prima facie case existed has been resolved and the subject matter at hand is whether the Defendant intentionally discriminated against Lee. This is clearly set out by this Court in *United States Postal Service Board of Governors v. Aikens*, (at 1982) as follows:

> The "factual inquiry" in a Title VII case is "Whether the Defendant intentionally discriminated against the Plaintiff." *Burdine, supra*, at 253, 101 S. Ct. at 1093. In other words, is "the employer . . . treating 'some people less favorable than others because of their race, color, religion, sex or national origin.'" *Furno Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L. Ed. 2d 957 (1978), quoting *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15, 97 S.Ct. 1843, 1854, n. 15, 52 L. Ed. 2d 396 (1977). The *prima facie* case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco, supra*. 438 U.S. at 577, 98 S.Ct., at 2949. Where the Defendant has done everything that would be required of him if the Plaintiff had properly made out a *prima facie* case, whether the Plaintiff really did so is no longer relevant. The District Court has before it all the evidence it needs to decide whether "the Defendant intentionally discriminated against the Plaintiff." *Burdine, supra*, 450 U.S. at 253, 101 S.Ct. 1093. *U.S. Postal Service Board of Governors v. Aikens* (103 S.Ct. 1481).

The second reason the Seventh Circuit erred in its reversal on the issue of Lee's qualifications is that all evidence introduced by the Defendant concerning Lee's qualifications was obtained subsequent to the act of discrimination alleged by Lee. Lee responded on May 10, 1977 to an advertisement placed by National Can. It is

undisputed that on that day two white applicants spoke to Michael Glynn, were interviewed by the shop foreman, Joseph Turczak, and were hired. On that day Lee was preliminarily interviewed only by Glynn and was told an interview with Turczak would be necessary. Turczak was the person at National Can to discover whether Lee's abilities as a machinist qualified him for the advertised position. The District Court opinion on this issue is as follows (R. 380-381):

> Neither Mr. Glynn nor Mr. Turczak ever knew or found out, and to this moment, have never tried to find out whether or not Mr. Lee was a qualified, competent, able, machinist.
>
> The evidence in this case is overwhelming on this point. The Plaintiff, Robert Edward Lee, on May 10, 1977, has been for many years a machinist. He had worked for the federal government at least on two occasions. He worked for numerous companies as a machinist.
>
> The Court observed Mr. Lee as he testified. The Court was impressed with the fact that he was glib and understood the meaning of terms commonly used by machinists. The record of this proceeding shows that he knows those terms, uses them with fluency and understood them. He has been tested by an expert in the field who found him to be a qualified machinist.
>
> It is true, as the Defendant insists, that Mr. Lee has a work record that apparently is far from acceptable by most companies. That is true. But, to this Court, that doesn't mean that Mr. Lee is not a qualified machinist, because this Court happens to know that many people are discharged wrongfully, they are discharged for race disciminatory reasons and others. We don't have time, nor should we look into the reasons why Mr. Lee was terminated all these various times. The Defendant would like to seize upon that and obtain a finding that Mr. Lee was not a qualified machinist. It would be most

> unjust conclusion to reach on the evidence in this record. He was a qualified machinist on May 10, 1977. There was a position open for a machinist. He applied. He was not given the position. Two white persons, Mr. James O'Connor and Mr. Larry Wickstrom, were employed that day.

The Seventh Circuit found that Lee's job history would preclude his being a qualified machinist, even though National Can did not make such a determination on May 10, 1977.

National Can broke the law on that date. National Can should not be permitted to dig into Lee's employment history to justify their behavior *unless* that employment history was considered on May 10, 1977 and was the reason for the shop foreman's failure to complete the interviewing process. There is not even an allegation that this is the case. National Can incorrectly argues that admitted mistakes of fact on Lee's application and recent firings of Lee absolve the Corporation of racially motivated conduct on May 10, 1977. This argument ignores that Title VII is a bar to racially motivated conduct by an employer; the failure in this case to look into the Plaintiff's qualifications *is* the conduct complained of by Robert Lee. The District Court opinion said, "[T]he relevant inquiry is, was he qualified as a machinist? That inquiry nobody has made. To this day, nobody knows whether Mr. Lee is a qualified machinist because nobody stopped to find out and apparently nobody is interested in that question, because after he filed his EEOC claim, then all these afterthoughts came up about what he did. (R. 380).

The District Court observed the demeanor of all witnesses and concluded that the reasons given by Lee for his employment history were plausible and not unreasonable. The District Court found that the Defendant's

contentions that Lee would not have been hired because of his employment history a subterfuge and a smoke screen to cover the Defendant's illegal, racially motivated conduct.

The District Court stated that unless Defendant could show some relationship between those facts discovered after May 10, 1977 and conduct of Defendant's agents on May 10, 1977, none of the facts are relevant or material or should be considered in resolving the controversy between Plaintiff and Defendant. (R. 115). The Court found that Defendant failed to establish said relationship. (R. 115).

In conclusion, the two reasons set out above, especially if read together, clearly indicate that the Seventh Circuit erred in reversing the District Court. The *Aikens* case directs the Court of Appeals to use all the evidence to decide whether a defendant intentionally discriminated on the basis of race. In the present case the conduct of National Can was entirely overlooked by the Seventh Circuit which used evidence discovered after the alleged discrimination to justify its failure to hire Robert Lee, evidence which purportedly would have rendered him unqualified for the position, although evidence is lacking in the record to prove that National Can does not hire persons with job histories comparable to Lee's. The primary fact is that no examination of Lee's qualifications occurred until *after* he filed a charge of discrimination. If the Seventh Circuit's decision is allowed to stand, employers who do not examine the qualifications of black applicants will be outside the law if they can discover by a subsequent investigation some reason why the black applicant probably would not have been hired. National Can did not allow Lee to continue in the interviewing process because he was black. National Can was unable to provide evidence that Lee was

unqualified as a machinist; they did not even bother to examine his qualifications; National Can did not check Lee's references until after the litigation commenced. No Court should be forced to speculate on what an employer might have done *if* a candidate for a job had been properly processed. Such a convolusion of the spirit of Title VII would be improper and condone the rude and illegal behavior of National Can toward Robert Lee.

CONCLUSION

The questions of law presented to this Court for review in this case are important in light of the history and purposes of Title VII of the Civil Rights Act of 1964. The fair application of Title VII is a well-established priority and the decision of the Seventh Circuit substantially undermines the mandate against racial discrimination imposed by Title VII. For the reasons set out above Robert E. Lee respectfully requests this Court to grant his Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2994

ROBERT E. LEE,

Plaintiff-Appellee,

v.

NATIONAL CAN CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 3466—**George N. Leighton**, *Judge.*

ARGUED DECEMBER 7, 1982—DECIDED FEBRUARY 8, 1983

Before BAUER, POSNER, *Circuit Judges*, and HOFFMAN, *Senior District Judge.**

BAUER, *Circuit Judge.* Plaintiff-appellee Robert E. Lee brought this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that Defendant-appellant National Can Corporation refused to hire Lee because of his race. The district court, after a bench trial, entered judgment for the plaintiff, and awarded Lee $55,306.94 in back pay plus attorney's fees and costs.

* The Honorable Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, is sitting by designation.

National Can's principal claim on appeal is that Lee failed to prove that National Can refused him employment because of his race. Reversal is further urged on the grounds that: the district court's conclusion that Lee was a credible witness was clearly erroneous; the district court's refusal to allow cross-examination with regard to Lee's character for untruthfulness constituted reversible error; and the district judge impermissibly based his decision on his perception of the prevalence of race discrimination in employment and his unsupported presumption that National Can engaged in such discrimination.[1]

We share the district court's concern over the prevalence of race discrimination in employment. Our review of the record in this case, however, compels the conclusion that Lee failed to prove that National Can refused him employment because of his race. Therefore, we reverse.

I. Background

The Equipment Manufacturing Division (EMD) of National Can Corporation is a small plant operated to provide machining services for National Can's production plants. Some time before May of 1977 the EMD facility began advertising for "Journeyman Machinists" with a minimum of five years experience.

On May 10, 1977, Lee, who is black, applied for a machinist's job at the EMD. Lee was required to complete a standard "National Can Corporation Application for Employment." The application called for information concerning Lee's marital status, education, military service, and employment history. Lee completed the application, and signed it beneath a certification which reads: "I hereby certify that the information given by

[1] National Can further urges that the district court's award of $55,306.94 back pay is excessive, and has no basis in the record. In light of our disposition of the liability issue, we need not reach the issue of back pay in this case.

me in this form is true and correct and I agree that if I am employed, and it is found at any time that such information is false, I will be subject to dismissal without notice."

After completing his written application, Lee was interviewed by Michael Glynn, the personnel manager at the EMD. The interview with Glynn was designed to screen out those applicants with unsatisfactory job histories, or who lacked the necessary qualifications for the positions being filled. Although Glynn noted that Lee had not worked during the preceding nine months, he allowed Lee to continue with the application process.

The next stage of the EMD hiring process was a technical interview; Lee was to be interviewed by Joseph Turczak, the machine shop supervisor. Turczak, however, was tied up in a production meeting at the time Glynn finished Lee's screening interview. Because he did not know when Turczak would be available, Glynn offered Lee the choice of waiting or rescheduling the technical interview. Although Lee waited for some time, he left the EMD building without being interviewed by Turczak.

No decision was made with respect to Lee's application on May 10, 1977. Glynn testified at trial that Lee's application was considered "pending" on that date. Lee admitted that no one told him on May 10 that he would not be hired.

Nonetheless, on the following day, May 11, 1977, Lee filed an EEOC charge against National Can. In the charge, Lee alleged that the "shop foreman"[2] had interviewed white applicants during the time that Lee was waiting to see Turczak. The EEOC charge further alleged that Lee had returned to the EMD on May 11, but had not been afforded an opportunity to meet with

[2] The "shop foreman" was described by Lee as about five feet eight inches tall, with dark hair mixed with grey. Turczak, by contrast, is six feet two inches tall, with light colored hair.

Turczak.[3] After an investigation of Lee's refusal to hire allegation, the EEOC concluded that there was not reasonable cause to believe that Title VII had been violated.

Sometime before June 7, 1977, National Can revised its help-wanted advertisement for EMD machinists; the new advertisement featured a mail-in coupon. Lee, who had begun working at Bell and Howell on May 15, 1977, answered the mail-in advertisement for EMD machinists using the name "Edward Lee." Glynn telephoned "Edward" and scheduled an interview for June 7, 1977.

Upon his arrival at the EMD on June 7, Lee filled out another application for employment with National Can. On this application, he gave his full name as "Edward Lee" and used a second social security number that he maintained under that name. When "Edward Lee" entered Glynn's office, Glynn recognized him as "Robert E. Lee" and compared the May 10 and June 7 applications. This comparison revealed differences in name, social security number, wife's name,[4] education, and employment history.

The disparities between the two applications alerted Glynn that at least one of the applications had been falsified. Pursuant to company policy expressed in the employee handbook, as well as on the application for employment, Glynn told Lee that he would not be hired because of the false information on one or both applications.

On August 28, 1978, Lee filed his complaint in this Title VII action against National Can. The case was tried without a jury in late 1981. The district court

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[3] At trial, Lee testified that he had telephoned the EMD on May 11, not returned in person as he claimed in the EEOC charge.

[4] Although Lee has been divorced since 1953, the May 10 application indicated that he was married to Juanita Lee; while on June 7 he wrote that he was married to Renee Esther Lee. Furthermore, despite his 1953 divorce, Lee filed joint income tax returns for 1977 and 1978 indicating that he was married to a Lois Lee.

ruled for Lee, awarding him back pay, attorney's fees, and costs. We have jurisdiction over National Can's appeal pursuant to 28 U.S.C. § 1291.

II. Analysis

A. The *Prima Facie* Case Under Title VII

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, makes it an unlawful employment practice for an employer to "fail or refuse to hire . . . any individual . . . because of such individual's race . . . ."

The basic allocation of burdens and order of presentations of proof in a Title VII case was set forth by the Supreme Court in *McDonnel Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Title VII plaintiff carries the initial burden of establishing a *prima facie* case of racial discrimination. The elements of the *prima facie* case are: (1) that the complainant belongs to a racial minority; (2) that the complainant applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, the complainant was denied employment; and (4) that the position remained open and the employer continued to seek applications from persons with the same qualifications as the complainant. *Id.* at 802.

Once the Title VII plaintiff has established a *prima facie* case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for failing to hire the plaintiff. The ultimate burden of proving discriminatory treatment remains with the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The district court below found that Lee had established a *prima facie* case of racial discrimination in hiring. Although National Can then articulated a legitimate nondiscriminatory reason for its failure to hire Lee, *i.e.*, the falsification of at least one of his applications for employment, the district court held that National Can had violated Title VII in rejecting Lee's application.

Ordinarily, an appellate court will not set aside a trial court's findings, particularly where those findings are based primarily upon the credibility of witnesses. *Klockner, Inc. v. Federal Wire Mill Corp.*, 663 F.2d 1370 (7th Cir. 1981); *Holbrook v. Institutional Ins. Co.*, 369 F.2d 236, 241-42 (7th Cir. 1966). We are not bound by the district court's findings, however, when our review satisfies us that those findings are clearly erroneous. The Supreme Court, speaking to this standard of review in *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395. Our review of the record convinces us that such a mistake has been made here.

The evidence in this case is inconsistent with the district court's finding that Lee met his burden of proving even a *prima facie* case of racial discrimination. It is undisputed that Lee belongs to a racial minority. Also undisputed is that National Can continued to seek journeyman machinists after June 7, 1977, the date Lee was refused employment. Proof of a Title VII violation, however, requires more.

In *Williams v. Boorstin*, 663 F.2d 109 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), the District of Columbia Circuit noted that:

> In the guidelines for a *prima facie* case *McDonnel Douglas* suggested one critical element for evaluating Title VII claims of employment discrimination. That factor is one of adequate *qualification* for the job on the part of the complainant employee. Qualification on the part of the employee, then, would seem to be almost indispensable to a Title VII violation.

Williams v. Boorstin, 663 F.2d at 116 (footnotes omitted).[5] The record in this case lends no credence to the

[5] In *Williams* an employee of the Library of Congress was discharged when it was discovered that he had falsified his

(Footnote continued on following page)

district court's finding that Lee was qualified to work as a journeyman machinist.

National Can was seeking employees who were skilled in the operation of a variety of machines including lathes, grinders, and drill presses. Lee's witnesses, however, testified to his competency in operating only two types of machines: milling machines and jig boring machines.

Lee's employment history further undercuts his contention that he is qualified as a journeyman machinist. This history is characterized by extended periods of unemployment, short-term jobs, and numerous firings. The district court chose to overlook Lee's unsatisfactory employment work record in finding that Lee was qualified for the position at National Can.[6] In doing so, how-

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[5] *continued*
qualifications in order to obtain the job. The district court held that a Title VII violation had occurred. The District of Columbia Circuit, on facts analogous to those before us here, reversed, commenting:

> It is not disputed that the plaintiff had lied on his job application where he misrepresented his academic credentials; it is not disputed that he lied on occasion during his employment to carry out his masquerade; it is not disputed that he continued to lie even after his supervisors confronted him. The only issue is whether plaintiff was fired in violation of his civil rights. . . . We reverse the district court on the ground that the employment discrimination standard laid down by the Supreme Court in *McDonnel Douglas Corp. v. Green* is utterly inconsistent with a finding of discrimination in this case.

Williams v. Boorstin, 663 F.2d at 111 (footnotes omitted).

[6] It is true, as the defendant insists, that Mr. Lee has a work record that apparently is far from acceptable by most companies. That is true. But, to this Court, that doesn't mean that Mr. Lee is not a qualified machinist, because this Court happens to know that many people are discharged wrongfully, they are discharged for race discriminatory reasons and others. We don't have time, nor should we look into the reasons why Mr. Lee was terminated all these various times.

Lee v. National Can Corp., No. 78 C 3466 (N.D. Ill., Dec. 3, 1981) (oral opinion).

ever, the district court went beyond the record in this case—noting that many people are discharged wrongfully for discriminatory reasons. Nothing in the record supports the district court's *sub silentio* conclusion that racial discrimination explains away Lee's inability to hold a job.[7]

Title VII does not compel employers to hire unqualified applicants with questionable employment histories. The Supreme Court described the policy underpinnings of Title VII in *McDonnel Douglas Corp. v. Green*, noting that "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." 411 U.S. at 801. Neither the testimony of Lee's witnesses as to his qualifications, nor his employment history, supports a conclusion that Lee would have contributed to "efficient and trustworthy workmanship" at National Can.

On the record before us, then, we are forced to conclude that Lee failed to prove his qualifications, and thus failed to establish a *prima facie* case of racial discrimination against National Can.

B. The Burden of Proof Under *Texas Dep't of Community Affairs v. Burdine*

Even if Lee had been able to prove his qualifications as a journeyman machinist at trial, we would reverse the district court's finding of a Title VII violation. Establishing a *prima facie* case of discrimination is only the first hurdle for an employment discrimination plaintiff.

In this case, National Can responded to Lee's allegations by articulating a legitimate, nondiscriminatory

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[7] Although persons may be wrongfully discharged from employment, "[w]hat 'could have been' is never alone a sufficient foundation for a *finding* of what really 'was,' and what 'could have been' is the language of the district court on this point." *Williams v. Boorstin*, 663 F.2d 109, 115 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981).

reason for its failure to hire Lee. Lee was denied employment because Glynn discerned on June 7, 1977 that at least one of Lee's job applications had been falsified. In refusing to hire Lee, Glynn was following a nondiscriminatory company policy.[8] Lee signed each application under a certification stating that the information was true, and that, if hired, Lee would be subject to dismissal without notice for the falsification.

After National Can articulated this reason for its adverse action, the burden of proving a Title VII violation remained with Lee. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). To prevail on his employment discrimination claim, Lee needed to prove that National Can's articulated reason for refusing to hire him was pretextual. *Id.* at 256. Thus, even if Lee had established a *prima facie* case, he would have had to go on to prove either that National Can's proffered explanation was not believable, or that National Can was more likely motivated by a discriminatory reason. *Id.* Yet, Lee did not introduce any rebuttal evidence, nor was the evidence introduced by Lee's case-in-chief sufficient to establish pretext.

The district court skirted the pretext issue by its finding that Lee was a victim of discrimination on May 10, 1977—the day he first made application for employment at the EMD. On May 10 Glynn had only one of Lee's applications to consider, and thus was unaware of any falsification of credentials. Thus, the articulated, nondiscriminatory explanation for National Can's failure to hire Lee could not effectively rebut a charge of discriminatory treatment on May 10.

The district court finding that Title VII was violated on May 10, 1977, however, is clearly erroneous. Glynn testified that Lee's application was considered pending on that date, while Lee testified that he was not told he would not be hired until June 7. Furthermore, Turc-

[8] Despite the district court's intimations to the contrary, nothing in the record suggests that National Can applied this policy discriminatorily.

zak's failure to interview Lee on May 10 is not the type of conduct prohibited by Title VII.[9]

III. Conclusion

Our review of the record in this case leaves us with the firm conviction that Lee was not a victim of employment discrimination. The evidence supports neither the district court finding that Lee was qualified for the position at National Can, nor the concomitant conclusion that Lee proved a *prima facie* case of racial discrimination. Furthermore, even if Lee were qualified to perform the duties of a journeyman machinist, National Can articulated a nonpretextual, legitimate reason for its refusal to employ him; a reason which Lee failed to rebut.

The findings of the district court to the contrary are clearly erroneous and must be set aside. Accordingly, the judgment of the district court is

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[9] In fact, National Can also advanced a legitimate, nondiscriminatory explanation for this—Turczak was unavailable because of a production meeting on the morning of May 10.

Opinion by Judge Bauer
JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 8, 1983

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. WALTER E. HOFFMAN, Senior District Judge*

ROBERT E. LEE,

Plaintiff-Appellee,

No. 81-2994 vs.

NATIONAL CAN CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 3466—Judge George N. Leighton

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Walter E. Hoffman, Senior District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX B

Opinion of the United States District Court, Northern District of Illinois, Eastern Division.

No. 78 C 3466 — George N. Leighton, Judge

[362]* * * *

THE COURT: All right. Let me proceed now to make findings of fact in this case and resolve the questions of law and I am going to do this from the bench. I do not presently intend to file a memorandum, but I am going to invite counsel in the case, if there is an appeal in this case, I invite counsel to look at the transcript and if there are any additional findings that should be made or some that should be corrected, call those to my attention by an appropriate motion. My intention is to dispose of this case from the bench. This is to accommodate the litigants and it is consistent with the mandate of Congress that these [363] cases be disposed of promptly and judgment entered accordingly.

We deal in this case with the right to work. In *Bosky v. The Board of Regents*, 347 U.S. 442 at Page 472, Mr. Justice Douglas, in dissenting, quoted from earlier Supreme Court decisions saying that, "The right to work has been acclaimed the most precious liberty that man possesses."

The Congress of the United States in enacting Title VII of the Civil Rights Act of 1964 has said that, "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin."

The parties have stipulated and agreed in this case that National Can Corporation, the defendant, is an employer under the statute.

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* Numbers in brackets refer to the pages of the District Court transcript of proceedings.

The parties have also stipulated that the plaintiff in this lawsuit, Robert E. Lee, is a member of a racial minority, namely, a Negro.

The facts of this case are very simple. They are not complicated, but first, the Court is going to deal with a defense that has been interposed in this case, and the reason why I am going to deal with that defense first is depending on how that defense is ruled on, this case will [364] turn, and the defense is that the plaintiff in this case is an unbelievable plaintiff, an unbelievable witness and because this case will turn on whether his version of the facts are accepted or the version of Mr. Michael Glynn, Personnel Manager of the defendant on the day in question is accepted.

I am going to resolve the question of the credibility of the plaintiff. The credibility of the plaintiff arises because on May 10, 1977, when he responded to an advertisement of the defendant, announcing that the defendant was seeking to employ journeyman machinists, he filled an application of the company seeking employment with it and when he was asked the name of his wife, he said Juanita Lee.

When he was asked his Social Security number, he gave it as 427-28-8743. When he was asked about his education, he said Kansas City Summer Machine Shop Practice during high school.

When he was asked, "Have you served in the U.S. Army Forces" he said, "No." When he was asked to give his employment history, he said that he had worked for the Piasecki or Piapecki Helicopter, Philadelphia, Pennsylvania, in the position of machinist from October, 1969 to September, 1976 and he gave other entries.

Most, if not all, of the entries on this form were not true. For example, particularly his answer to the [365] question, "Have you served in the U. S. Armed Forces?" Answer, "No."

In the course of this trial, the plaintiff has testified that he, in fact, served in World War Two, rose to the rank of staff sergeant and was honorably discharged. So, therefore, what he should have said was, "Yes," and he

could have given the branch and the rank he had attained.

It has been developed in the course of the plaintiff's testimony that some time after he filled this application on May 10, 1977, an occasion which he couldn't recall, he inserted the correct answer here. It has also been developed at trial that it isn't true that the plaintiff worked for Piasecki or Piapecki Helicopter in Philadelphia, Pennsylvania from October, 1969 to September, 1976.

Further, it has been established in the course of these proceedings that the day following the plaintiff's application for employment with the defendant corporation on May 10, 1977, he went to the EEOC office here in Chicago and he made a complaint about the way he was treated on May 10, 1977 by the defendant and I quote from the portion of that form that requires the complainant to explain what unfair thing was done to him.

The pertinent part of it, with all of its ungrammatical expressions, is as follows, and I quote: "As the White applicant was interviewed by the foreman, I [366] continued to wait. After four hours, I mentioned to the receptionist that I was waiting to see the foreman. I was told that they was in a meeting. I left and returned the next day. I was told that the party was on the phone. After two hours, I was told he was not in, but would call me, which he never did."

Now, the day that this was being written was the next day following May 10, 1977. Now, the one possibility that exists is that this was being written in the afternoon and the plaintiff, in fact, had gone to the place of business of the defendant that morning. The evidence in the trial of the case doesn't show this.

Further, on June 7, 1977, the plaintiff had responded prior to this time to an advertisement of the defendant which differed from the advertisement that led him to go to the defendant's plant in the first place on May 10, 1977, in that this advertisement required the interested party to clip out a coupon and mail it to the defendant, which the plaintiff did.

Plaintiff has testified that he received a telephone call and when the person he spoke with spoke on the

telephone, he recognized it as the voice of Mr. Michael Glynn, whom he had talked with on several occasions concerning the May 10, 1977 attempt to obtain employment.

This application that resulted from the June 7th [367] attempt to obtain employment from the defendant again as a machinist, contained the name Edward Lee.

The first one, just to go back to it, had described the plaintiff as Robert Edward Lee. The Social Security number on this second application is No. 337-28-7743. Now, anyone who knows the Social Security system knows that evidently this Social Security number was issued sometime before the one that the plaintiff placed on his May 10, 1977 application.

In this second application, the name of the person, apparently his wife, is the person to be notified in the event of an emergency, which, in the first application the plaintiff has said was Juanita Lee, in this application she is described as Renee Esther Lee. The entry about school and education is different. The list of people he worked for was different and from other evidence in the case, to put it most kindly, is not accurate.

In both applications, the plaintiff signed a certification which reads as follows: "I hereby certify that the information given by me in this form is true and correct and I agree that if I am employed and it is found that at any time that such information is false, I will be subject to dismissal without notice."

In this latter application of June 7, 1977, the plaintiff signed his name Edward Lee. In the earlier one [368] he signed his name Robert E. Lee.

There is evidence also in an Exhibit of the defendant that the plaintiff had made statements concerning his employment with a Crane Company and this was either inaccurate or not true. He made statements concerning his marital status. He had given different names of women to whom he was married and had made conflicting statements about his marital status.

Defendant's Exhibit 35-B lists the various sources of either inconsistent or contradictory statements that the plaintiff has made concerning his employment with the Crane Company.

Defendant's Exhibit 35-C gives the various sources of contradictory, conflicting statements that plaintiff has made concerning his marital status.

And Defendant's Exhibit 35-A gives the various conflicting statements the plaintiff has made concerning his Social Security number—the application of May 10, 1977, the application of June 7, 1977, the trial here on November 30th when he said he only had one Social Security number, when, in fact, there is evidence he had two, and the deposition of October 12—the year isn't given—in which he said he had two Social Security cards, and a trial before Judge Decker in the case of Robert E. Lee vs. International Harvester Company, 78 C 4609 in which he said [360] he had two Social Security cards.

Now, this particular source of inconsistent or untruthful testimony is important because Judge Decker in that case found Mr. Lee, the plaintiff in this lawsuit, unworthy of belief, and Judge Decker said that the plaintiff in this lawsuit, Mr. Lee, was a less credible witness. He said, in fact, in all his experience, he had never seen such a glaring example of a witness who on the stand makes a statement one minute, disputes it, and who, himself disputes the statement he makes in the next minute. Judge Decker concluded that this plaintiff before him, the witness before him in that case, was utterly lacking in credibility. He went so far as to say he was going to have transcribed the report of proceedings before him and circulate it among the Judges of this Court, and he even went further to say he was going to refer the matter to the United States District Attorney for whatever action he deemed appropriate.

The proceeding before Judge Decker is a different case. This Court is not familiar with the facts. It doesn't know anything about the issues, it hasn't read the transcript in full. It only makes note of what took place before Judge Decker.

From these facts, the defendant argues that the plaintiff should not be believed, he is a discreditable witness and a person who files affidavits containing untrue [370] statements and who makes statements that are contradicted by him on other occasions, and, therefore, the

defendant argues that he should not be believed and his version of the facts on which this case will turn should not be accepted by the Court and, therefore, judgment should be in favor of the defendant.

I am going to state for the record what is the law on this subject and I cite from a fairly recent case which contains the rule of law which I think is applicable and that is In re Carr, a decision decided by the United States District Court for the Northern District of Ohio.

The Court said:

> "Inconsistencies or discrepancies in the testimony of a witness, especially when under oath and obvious disparities in testimony impose upon the Court the burden of considering whether they pertain to matters of importance or unimportant details and whether they result from innocent error or calculated falsehood."

In United States vs. Copeland, cited at 263 F.Supp. 976, at 978, 979, decided in 1967 by the United States District Court for the Southern District of New York, the Court said that:

> "A Court is not required to base [371] a determination on credibility solely upon the contents of testimony. Rather, as trier of the facts, I may, and indeed, I should, take into consideration the whole nexus of sense impressions which I get from a witness."

In that instance, the Court was quoting from Dyer vs. McDougall at 201 F.2d, Page 265, at 269, a decision of the United States Court of Appeals for the Second Circuit in 1952 by Judge Learned Hand.

Perhaps one of the best statements on this subject with which this Court is concerned is to be found in the 98 volume of Corpus Juris Secundum on Witnesses, Section 458, and I am going to quote it at length because it is the rule of law that I am going to follow in this case.

This authority says, and I quote:

> "It has been said that the credibility of testimony must be decided before weighing it and that there is no such thing as a legal equality of credibility between witnesses. The testimony of each witness is

to be considered for what it seems to the trier to be worth. According to the facts and circumstances of the particular case [372] bearing on credibility all of a witness' testimony may be believed or all rejected or a part may be believed and a part rejected, even though the witness may have testified falsely with respect to a particular matter or had been contradicted, or a witness' testimony may be believed, although it is uncorroborated and testimony has been presented to impeach him."

Now, applying this to this case, a very, very simple, mundane, ordinary case of a man who said he wanted a job as a machinist and so, on May 10, 1977, in answer to an ad he went to the place of business of the defendant, National Can Corporation. One of the principals of credibility that is mentioned in many of the cases—every lawyer of experience knows the rule and it is this—when the subject of a witness' credibility arises, one of the quick, ready rules that should be applied is to ask one's self a very simple question: "Is this witness telling something that is ordinary in the affairs of life, occurs with some regularity? Is it something that is believable in itself? Does it happen to others? Is there anything bizzare, unusual about what he is saying?" There is nothing unusual or bizzare about what Mr. Lee testified here. This Court will say for the record that with one or two little matters, for example, Mr. Lee [373] said he only had one Social Security card, I think he was either mistaken or didn't tell the truth. But, what has the Social Security card got to do with the issues in this case?

Going back to what I just read from In re Carr, you look to see, does it concern a matter of importance, or is it an unimportant detail?

Now, dealing with this question of the Social Security card, I am not satisfied from what I have heard, even with due credit and due respect to Judge Decker—I don't know what came up in that trial about the Social Security card.

Of course, if it could be established that Mr. Lee was trying to use several Social Security cards for the purpose of defrauding the defendant or somebody else—but

nothing like that appears in this case and I don't know if it appeared before Judge Decker.

I observed Mr. Lee throughout the time he has testified and I want to say for the record, in case this transcript is read by some other Judge, that I find the whole thing perplexing. Mr. Lee doesn't impress me as a liar or a fraud. Mr. Lee didn't testify about anything that was bizzare, unbelievable in itself, unusual or that doesn't happen. The experience that Mr. Lee described has happened to thousands and thousands of persons like him in the City of Chicago in my lifetime and in the past and regrettably, it [374] perhaps will happen to others like him. So, there is nothing unusual about what he describes. What he said was in itself believable.

The other rule to be applied is, is he corroborated by some other fact or circumstance? Well, he is corroborated. It is true that National Can advertised for journeyman machinists. It is true that he is a qualified machinist. Despite the fact that he has been fired many times, this Court has to conclude that at the time he went to the defendant's place of business, he was a qualified machinist. The defendant company did not question his competence, his ability as a machinist, because they never tried to find out. So, he is corroborated by the facts and circumstances. Is it true that National Can Corporation on May 10, 1977 had an installation at the address he said? The answer is yes, it is there. The parties agree it was there.

Is it true that National Can Corporation had a man named Michael Glynn who was the personnel supervisor? The answer is yes, Michael Glynn met him and talked with him.

Michael Glynn has testified in these proceedings and he said yes, Mr. Lee was there. The only quarrel between Mr. Lee and Mr. Glynn was whether or not Mr. Lee remained until 3:30 as he says, or left before Noon as Mr. Glynn says, at Mr. Glynn's suggestion. So, he is corroborated by facts and circumstances. He doesn't tell a bizzare, unbelievable [375] story.

I have come to the conclusion, after observing Mr. Lee, noticing his demeanor, listening to him and trying to

fathom why would a person make these statements—well, there are a lot of explainable reasons for it. Take, for instance, his going to the EEOC office and saying something plainly erroneous. Well, the unkind heart will say, "Well, he is a liar, he is just a fraud and he shouldn't be believed." But the kind, human heart will say, "Now, why is this? This is a person looking for a job as a machinist." He wasn't looking for a job as a spokesman for the corporation. He wasn't looking for a job as a secretary. He was looking for a job as a machinist. The relevant inquiry is, was he qualified as a machinist? That inquiry nobody had made. To this day, nobody knows whether Mr. Lee is a qualified machinist because nobody stopped to find out and apparently nobody is interested in that question, because after he filed his EEOC claim, then all these afterthoughts came up about what he did.

Now, take the application of June 7, 1977. Mr. Lee has explained and this Court finds it a totally plausible, acceptable explanation. He wanted the job as a machinist and he wanted to find out why they wouldn't talk with him on May 10, 1977, so he changed his name, gave them his other Social Security number which, on the record before me, I [376] can't find he had illegally or improperly because no one has produced any evidence about it. So, he used that Social Security number and he went there to try to find out about a job. I happen to know, and it is a matter of common knowledge, that a person seeking this precious liberty of the right to work that Mr. Justice Douglas spoke of in Bosky vs. Board of Regents, will do what Mr. Lee did, he will use subterfuge to find out whether or not these people he dealt with on May 10, 1977, were not, in fact, engaged in an unlawful employment practice of race discrimination. He wanted to find out.

Now, we can frown upon the use of another Social Security number. We can frown about his use of a different name. We can frown about it if we want to, but his conduct is explainable if you look at it with an open heart and an open mind and that is how I am looking at it.

Now, the other thing that he is corroborated about, he is corroborated by Mr. Glynn. If Mr. Glynn was testifying truthfully in this Court that he called Mr. Lee and arranged for Mr. Lee to come for an appointment, the first thing that Mr. Glynn would have told Mr. Lee when he saw him, would have been, "Well, my God, man, I have been looking for you. Well, sit down here and take a job as a machinist." He didn't do that. The first thing that Mr. Glynn did was to go compare those two applications and then characterizing one or the [377] other as false. Why? Because Mr. Glynn and Mr. Turczak were engaged in race discriminatory conduct toward Mr. Lee. That is why Mr. Glynn did that.

So, for all of these reasons, I come to the conclusion that Mr. Lee is not a person not to be believed in this case because he is corroborated in an important, small way, and, therefore, the defense which the defendant asserts will not be accepted by this Court.

Now, let me turn now to the facts that give rise to this controversy and in the main, they are not in dispute.

The parties agreed that on May 10, 1977, Robert E. Lee, in answer to an ad inserted in the Chicago newspapers by the defendant, went all the way from the south side of Chicago to Elk Grove, Illinois. I take judicial notice that is a long distance for anybody to go traveling to go looking for a job.

From his testimony and from the testimony of Mr. Michael J. Glynn, the personnel manager of the defendant, and the testimony of Mr. Joseph Turczak, the machine shop foreman—and these are the only persons who testified about the events of May 10, 1977—Mr. Lee arrived at the place in question, the facility of the National Can Corporation somewhere aroung 9:00 o'clock or 9:30.

Mr. Lee was asked for and was given the application form to which the Court has made reference earlier and he sat [387] down in a room not far from the receptionist's area to fill out the form. Two other men came in, it might have been three, but at least two came in. Mr. Lee then filled out the form, took it to the receptionist and the

receptionist then took him into the office of Mr. Michael Glynn. Mr. Glynn was the personnel manager and it was his job to interview Mr. Lee. Mr. Glynn looked at the application form that had been filled out by Mr. Lee. He noticed the employment history, found nothing wrong with the application form. It was the intent or purpose of this application process for Mr. Lee to have filled out the application form, be interviewed by Mr. Glynn and then be interviewed by the shop foreman, since he was seeking the position of a machinist, a journeyman machinist, and Mr. Turczak was the man to ultimately pass upon his qualifications. The process was that after Mr. Turczak had interviewed Mr. Lee, if he was found qualified for the job by Mr. Turczak, he was then to be subjected to a check of the work history and other details of the application.

Mr. Lee and Mr. Glynn met and the discussion was a few minutes and ordinarily Mr. Glynn would have discussed such matters as the fringe benefits of the employment, like insurance coverage and matters of that kind. The Court finds that none of that occurred in this case. Mr. Glynn met Mr. Lee for a few minutes and told Mr. Lee that he would have to wait and see Mr. Turczak.

[379] Mr. Lee went back to the reception room and sat down and waited. When Mr. Lee inquired of the receptionist why he hadn't seen Mr. Turczak, the receptionist told him that Mr. Turczak was at a meeting.

According to what the lawyer for the defendant told the Court today, something the Court had not noticed in the facts, and I make no findings with regard to this, because I don't have a transcript and my notes don't show this, but Mr. Levenstam for the defendant said this was a small plant, had only 20-some odd employees, 5 of whom were minorities, 2 Blacks, 2 Latinos or Hispanics, 1 Asian. But Mr. Turczak was occupied in a meeting that took apparently, at least, all morning, and so Mr. Lee waited.

The Court finds from all the evidence, including the circumstances surrounding the testimony of all the witnesses, that Mr. Lee waited until about Noon, then he went to the receptionist and asked her again about Mr.

Turczak and Mr. Turczak was still at this meeting. She suggested that he go have lunch and come back, which he did.

On his way back from having lunch, he saw Mr. Glynn come back to the office. He then waited again, continued to wait until about 3:30 in the afternoon, and then he went to the receptionist and asked her what he ought to do and she said he should decide either to wait further or leave and call the next day. Mr. Lee left. He did call the next day, [380] talked to Mr. Glynn. Mr. Glynn said they were still having meetings. The other attempts he made to communicate with Mr. Glenn were just as fruitless with regard to his interview by Mr. Turczak. He never was interviewed by Mr. Turczak.

Neither Mr. Glynn nor Mr. Turczak ever knew or found out, and to this moment, have never tried to find out whether or not Mr. Lee was a qualified, competent, able, machinist.

The evidence in this case is overwhelming on this point. The plaintiff, Robert Edward Lee, on May 10, 1977, had been for many years a machinist. He had worked for the federal government at least on two occasions. He worked for numerous companies as a machinist.

The Court observed Mr. Lee as he testified. The Court was impressed with the fact that he was glib and understood the meaning of terms commonly used by machinists. The record of this proceeding shows that he knows those terms, uses them with fluency and understood them. He has been tested by an expert in the field who found him to be a qualified machinist.

It is true, as the defendant insists, that Mr. Lee has a work record that apparently is far from acceptable by most companies. That is true. But, to this Court, that doesn't mean that Mr. Lee is not a qualified machinist, because this Court happens to know that many people are [381] discharged wrongfully, they are discharged for race discriminatory reasons and others. We don't have time, nor should we look into the reasons why Mr. Lee was terminated all these various times. The defendant would like to seize upon that and obtain a finding that Mr. Lee

was not a qualified machinist. It would be a most unjust conclusion to reach on the evidence in this record. He was a qualified machinist on May 10, 1977. There was a position open for a machinist. He applied. He was not given the position. Two White persons, Mr. James O'Connor and Mr. Larry Wickstrom, were employed that day.

Now, according to Mr. Glynn, Mr. Wickstrom was interviewed by Mr. Turczak in the morning before Mr. Turczak went to this meeting. There is a conflict about that and I don't think it is necessary to resolve the conflict as to that point. It is enough to point out that on that date two White persons were given the job of machinists and Mr. Lee, a Negro, was not even interviewed.

But, the case of Mr. O'Connor is of particular interest because, according to Mr. Glynn, the defendant's testimony, Mr. O'Connor wasn't interviewed in the morning; he was interviewed in the afternoon. According to Mr. Glynn, he told Mr. Lee to come back and tried to reach Mr. Turczak later and according to Mr. Glynn, Mr. Lee agreed to do that, but with regard to Mr. O'Connor, Mr. Glynn was careful to [382] arrange to have Mr. Turczak interview him in the afternoon.

Mr. Turczak contradicts Mr. Glynn's testimony that Mr. Glynn gave here under oath. Mr. Glynn said he told Mr. Turczak that Mr. Lee, by name, was waiting to see him in the afternoon. Mr. Turczak said nothing like that occurred. What happened was he was told there were two people waiting to see him and that he was available in the afternoon and he interviewed Mr. O'Connor and hired him.

The Court accepts that version given by Mr. Lee. Why? Because it is reasonable. It is supported by the facts and circumstances. It is corroborated by all the surroundings of the very simple event. It is plausible.

The Court observed Mr. Lee when he testified and the Court found him to be believable, despite all the other things that the defendant has called this Court's attention to, to discredit Mr. Lee as a witness.

Now, this being so, the Court concludes that the defendant, National Can Corporation, on May 10, 1977, engaged in an unlawful employment practice against the plain-

tiff, Robert E. Lee, because on that day, the defendant, Mr. Lee, being qualified for the position of journeyman machinist, did not interview Mr. Lee, interviewed two White persons, employed the White persons and didn't employ Mr. Lee because of his race and color.

Therefore, judgment is entered for Robert E. Lee, [383] against the defendant and the amount of the judgment is as follows: it has been made part of the record of these proceedings that from May 1, 1977 to July 1, 1977, the plaintiff was employed by Bell & Howell.

Now, while I am on this point, let me make note of something because it goes back to this question of credibility and the evidence. The defendant has called the Court's attention to the fact that on June 7, 1977, Mr. Lee was employed, and, therefore, he wasn't in need of a job, said the lawyer for the defendant and he wasn't looking for a job if he had one. Well, we don't know that. All we know is he had a job with Bell & Howell. What the work conditions were, where the plant was located, how far was it from his home, what were the advantages or disadvantages of that job, what were the fringe benefits and other circumstances, we don't know. A person can have a job today and look for another job at the same time for a lot of reasons. He may want to change the neighborhood in which he lives, he may want to improve his chances for future promotion. He may want to get better fringe benefits. He may have learned that the company he is seeking to work for has some advantages which the one he is now working for doesn't have. There are a lot of reasons, understandable, plausible, reasonable grounds to seek another job even while holding another one.

It has been agreed that he earned $1,750 during [384] that period of time. He received unemployment compensation from July 1, 1977 to December 31, 1977 at $135 a week for 26 weeks. That is $3,510.

Then, from February 1, 1978 to April 16, 1978, he worked for Danley Machine Company. He earned from them $2,559.71.

Then, on May 1, 1978, until November 30, 1978, he went back on unemployment compensation for $108 a week for 26 weeks total of $2,808.00.

Then, he went on general assistance from December 1, 1978 to March 1, 1979 at $178 a month, plus $40 to $50 a month food stamps, a total of $669.

Then, it says here, that January 1, 1979, for four weeks, to February, 1979, he worked for Pyle National at $6 an hour, he earned $960.

Then, on March 1, 1979, to—

MR. STIMSON: March 31, Your Honor.

THE COURT: March 31, 1979, he worked for Brad, Foote and Gear and he earned $673.34 from them.

Then he went on unemployment compensation on April 1, 1979 to October 21, 1979, at $78 a week, for a total of 26 weeks. He earned $2,028.

Finally, from November 1, 1979 to date, he has been on general assistance, $178 a month, plus food stamps, a total of $5,575.

[385] The total is $20,533.05.

The evidence shows that if the defendant had employed the plaintiff on May 10, 1977, he would have earned a total of $75,840 up to now at $320 a week. This is a total of $75,840 less the wages and other benefits earned during the period of $20,533.05, an amount of wages lost of $55,306.95 and this is the amount of judgment in favor of the plaintiff and against the defendant.

The plaintiff has asked that attorney fees be awarded. On the Court's findings of fact and conclusions of law, the plaintiff is a prevailing party. The Court of Appeals for this Circuit has held that in a case of this kind, when the plaintiff is the prevailing party, the attorney fees are awarded as a matter of course, and it has been shown that defendant has agreed that counsel for the plaintiff, Mr. Rolland H. Stimson, whose offices are at 69 West Washington Street, Chicago, Illinois, has devoted 130¼ hours to this case. Mr. Stimson was appointed by the Court from the list of lawyers who are appointed in these cases. Mr. Stimson has said that his usual rate of charge in cases of this kind, the ordinary and customary charge is $200 per hour but the parties have agreed that it should be $150 per hour. I assume that this agreement is subject to the defendant's contention that the plaintiff shouldn't recover any compensatory award for lost wages

or any attorney [386] fees. But, based on the amount of hours devoted, the amount of time, services rendered, the usual and customary charges, the nature of the case, its difficulty, this Court notes that Mr. Stimson came into the case, substituted for another lawyer who withdrew, prepared the case for trial and appeared here when the case was called, represented the plaintiff and has focused attention on the crucial issue in the case. This Court was impressed when Mr. Stimson told the Court at the beginning of this trial what this case was about. He limited it to the relevant, material issue in the case, namely, did the defendant discriminate against the plaintiff because of his race on May 10, 1977, and the Court was able to focus on the issue in the case because of the way Mr. Stimson presented it.

Therefore, the plaintiff will be awarded the amount of $19,534.50 as attorney's fees and that is calculated on the basis of 130¼ hours at $150 per hour. The Court finds the rate is reasonable, customary and is ordinarily charged in cases of this kind and for a lawyer of experience as Mr. Stimson has had, this is a reasonable rate of fees to be awarded in a case like this one.

Now, this concludes the Court's findings of fact, conclusions of law and judgment is entered and this concludes the case.

Now, let the record show that the lawyers on each [387] side will be responsible for the Exhibits so that if the Clerk desires any of the Exhibits, the lawyers are to make these Exhibits available. By the "lawyers" I mean Mr. Barry Levenstam of Jenner & Block for the defendant, Mr. Rolland Stimson for the plaintiff.

Mr. Grice, will you hand to counsel all of these Exhibits which I was given during the trial. They are being returned to counsel.

Let me again remind you that in the event this record is transcribed for review, counsel are to examine what I have said from the bench and if any part of it needs clarification, editorial correction of any other attention you are to call it to my attention by an appropriate motion and I will consider the matter and act on it promptly.

All right, Mr. Grice.

THE CLERK: Very well, Your Honor.

THE COURT: Give those to Mr. Levenstam.

THE CLERK: Yes, sir.

THE COURT: Would you staple this together.

THE CLERK: Yes, sir.

THE COURT: Oh, Mr. Stimson, one other thing. I am sorry, but for reasons which I don't know, I missed something that I didn't do, and that is the monies expended for costs of trial, $856.34.

MR. STIMSON: Yes, Your Honor.

[388] THE COURT: Why don't you submit the judgment order.

MR. STIMSON: Very well.

THE COURT: That will include those three items.

MR. STIMSON: I shall do so.

THE COURT: The lost wages, the attorney's fees awarded and the recovered costs disbursed by counsel.

Thank you very much.

MR. STIMSON: Thank you.

THE COURT: Mr. Grice, will you staple these now and put these in the file. Here.

THE CLERK: Yes, sir.

MR. LEVENSTAM: Thank you, Your Honor.

THE COURT: Thank you, gentlemen.

(Which were all the proceedings had in said cause on said dates.)

APPENDIX C

SUPREME COURT OF THE UNITED STATES
No. A-916

ROBERT E. LEE,
Petitioner,
v.
NATIONAL CAN CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 8, 1983.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 9th day of May, 1983.